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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 220.

JOVITA PEP[illegible],
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF.

JOHN G. LERCH,
Counsel for Petitioner.

PREW SAVOY,
DAVID A. GOLDEN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

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OCTOBER TERM, 1948.

No. .

JOVITA PEREZ,
Petitioner,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Customs and Patent Appeals.

Petitioner, Jovita Perez, prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in *The United States* v. *Jovita Perez,* Customs Appeal No. 4588, entered March 1, 1949 (timely petition for rehearing denied by the United States Court of Customs and Patent Appeals on May 2, 1949), reversing a judgment of the First Division (Appellate Term) of the United States Customs Court rendered November 10, 1947, which modified a judgment of the trial court of the United States Customs Court rendered October 3, 1946.

STATEMENT.

Section 501 of the Tariff Act of 1930 as amended (U. S. C. Title 19, Section 1501, 46 Stat. 708), (Appendix I), grants to importers the right to judicial

review of the decisions of appraisers of customs in appraising imported merchandise.

Section 402(f) (U. S. C. Title 19, 46 Stat. 708), (Appendix II), provides the method of determining "cost of production" of imported merchandise where that basis has been decided to be the correct basis for applying ad valorem rates of duty.

T. D. 48860 (Treasury Decisions, Volume 71, page 431), (Appendix III), is a ruling by the Commissioner of Customs in which he attempts to define and prescribe a method of applying the item of "profit" in figuring "cost of production" of imported merchandise. It is the contention of petitioner that this ruling is contrary to the statute. We quote from T. D. 48860:

> * * * the "profit which is ordinarily added in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same general trade as the manufacturer or producer of the particular merchandise under consideration," is the usual difference between the manufacturers' or producers' selling prices of such merchandise of the same general character and all costs and expenses incurred by such manufacturers or producers in connection with such merchandise.

It is the further contention of the petitioner that the above ruling, "If merchandise of the same general character as the particular merchandise under consideration and otherwise within the terms of paragraph (4) is sold for home consumption in the country of production the usual profit *realized* from such sales

is the profit to be added," also contravenes the statute. (Italics added.)

Petitioner imported a certain flavoring syrup called "El Masco," from Mexico. It was entered at a value of $167.06 for a unit of six barrels. The appraiser, by applying the illegal regulation (T. D. 48860), advanced the value to $215.16 for the unit.

Petitioner filed an appeal to reappraisement by the United States Customs Court under Section 501 of the Tariff Act of 1930, as amended. It was stipulated that the proper basis of appraisement was the statutory cost of production and all elements of cost of production, except the item of profit were also stipulated. The issue, therefore, is narrowed to the proper determination of "the profit which ordinarily is added * * * by manufacturers * * *" within the meaning of Section 402(f).

It is claimed by petitioner that the profit applicable herein (paragraph 4 of Section 402(f)) is $44. or 44.59 per centum of subparagraphs (1) and (2) of said Section 402(f) which is the "profit ordinarily added * * *". The appraiser in following T. D. 48860, *supra*, which defines the profit as "the usual difference between the manufacturer's or producer's selling prices * * * and all costs and expenses incurred * * *," found the profit to be $99.25 or 98.15 per centum for a unit of six barrels.

Had the appraiser determined "the profit which is ordinarily added * * * by manufacturers * * *" as he was required to do under the statute, he probably would have arrived at the same figure as that claimed by the petitioner herein. Instead he followed the extralegal method prescribed by the regulation T. D. 48860, *supra*.

Jurisdiction.

The judgment of the United States Court of Customs and Patent Appeals was entered March 1, 1949 (R. 128). Petition for rehearing, timely filed under the rules of that Court, on March 23, 1949, was denied on May 2, 1949 (R. 128). The jurisdiction of this Court is invoked under Section 195 of the Judicial Code, as amended (U. S. C. Title 28, Sec. 1256).

Questions Presented.

(1) What is the addition for profit * * * equal to the profit which ordinarily is added * * * by manufacturers * * * in determining cost of production under Section 402(f) of the Tariff Act of 1930?

(2) Did the Secretary of the Treasury exceed his powers in promulgating T. D. 48860?

(3) Did the United States Court of Customs and Patent Appeals correctly apply Sec. 402(f) of the Tariff Act of 1930, in determining cost of production of "El Masco"?

Reasons for Granting the Writ.

1. The question presented in this case involves an important question of Federal law which is of considerable importance to a large number of importers, which has not been, and should be, settled by this Court.

During World War II and since, "cost of production" as a basis of appraisement to determine the value of imports has become of increasing, and of great importance in the administration of the tariff laws.

The guide for importers and appraisers, for determining "cost of production" is Treasury Decision 48860, despite the fact that in theory and in application, it is contrary to the express language of Sec. 402(f). The Court of Customs and Patent Appeals applied this Treasury Decision in its acceptance of the substance of Government Exhibit 6, and that decision will henceforth be followed by appraisers, unless corrected by this Court.

The statute specifically provides that, to determine cost of production, in order to determine the duty, appraisers shall *add*:

1. Cost of labor and materials.
2. Usual and general expense.
3. Cost of packaging.
4. An addition for profit, * * * equal to the profit which ordinarily is added * * * by manufacturers * * *.

T. D. 48860 requires that the opposite be done. From the selling price, the appraisers *deduct,* non-dutiable

charges, materials and labor, usual and general expense, and cost of packaging. The balance is called "realized profit" and is added back to determine the value on which to base the duty.

This is United States value as defined in Section 402(e) under a different name, since the selling price includes the duty, which is the element sought to be determined *after* "cost of production" has been determined. Yet, the parties and the Courts below are in agreement that there is no United States value, a requirement under Section 402(a)(3) of the statute before "cost of production" may be used as the basis for appraisement (Brief, p. 20).

Because many thousands of importations are being, and will be, affected by T. D. 48860 and the decision below, a decision of this Court giving effect to the express language of the statute is required.

2. THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The term "an addition for profit * * * equal to the profit which ordinarily is added * * * by manufacturers * * *" was used in its ordinary and accepted sense. Congress may be presumed to have known that the usual management practice is to make an addition for profit in computing the selling price, when it used this simple language (Appendices IV and V).

The trial court and appellate court gave full recognition to known business practices, whereas, in reversing, the Court of Customs and Patent Appeals ignored it.

Furthermore, in substituting its opinion for that of the trial court, the Court of Customs and Patent Appeals went beyond its appellate jurisdiction.

In order to discard the evidence produced by the importer as to the addition for profit made by the witness, Walter Mack, the Court below had to ignore usual business practices, accepted by the Court below. Also, it had to find a "realized profit," which could not exist. There could be no "realized profit" on the first unit of "El Masco" imported, as the trial court found. Thus, the Court of Customs and Patent Appeals acted as a trial court and exceeded its power of review in reversing the appellate court.

Conclusion.

It is respectfully submitted that the Petition should be granted.

John G. Lerch,
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David A. Golden,
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IN THE

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No. .

JOVITA PEREZ,
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THE UNITED STATES,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States Customs Court (R. 143) is reported in R. D. 6402, Vol. 17, U. S. Customs Court Reports, page 331. The opinion of the United States Customs Court, First Division (R. 161) is reported R. D. 7432, Vol. 18, U. S. Customs Court Reports, page 292. The opinion of the United States Court of Customs and Patent Appeals (R. 178) is reported as C. A. D. 407, weekly Treasury Decisions of May 12, 1949, Volume 84, No. 19, page 13.

Jurisdiction.

Petition, page 4.

Statutes and Treasury Decision Involved.

Tariff Act of 1930

Sec. 501, as amended. This section will be found in Appendix I.

Sec. 402. This section will be found in Appendix II.

T. D. 48860.

This Treasury Decision will be found in Appendix III.

Statement of the Case.

Petition, page 1.

Specification of Errors to Be Urged.

The United States Court of Customs and Patent Appeals erred:

1. In applying in substance T. D. 48860, which is contrary to, and in extension of, the express language of Sec. 402(f) of the Tariff Act of 1930.

2. In holding that the "addition for profit" of the first unit of "El Masco" imported, required by the statute, is the "profit realized" by application of the arbitrary method of computation provided by T. D. 48860.

3. In failing to hold that there was no realized profit upon the importation of the first unit of "El Masco" manufactured.

4. In failing to hold that the addition for profit * * * equal to that which ordinarily is added * * * by

manufacturers * * *, required by the statute, is the addition for profit added by manufacturers in computing the selling price.

5. In failing to hold that the "addition for profit" of the first unit of "El Masco" imported *"equal to the profit which ordinarily is added * * * by manufacturers * * *"* was $44.00, as found by the United States Customs Court, First Division.

6. In reversing the decision of the United States Customs Court, First Division.

ARGUMENT.

1. The Secretary of the Treasury exceeded his powers in promulgating T. D. 48860.

The Secretary of the Treasury has unquestioned power to issue regulations, as a guide to Customs Appraising Officers or others, to construe ambiguous language, and generally to carry out the purposes of the statutes being administered by his department.

However, he is not empowered to issue regulations contrary to specific language of an Act of Congress, or in extension, or amendatory, of an Act of Congress. Nor is he empowered to issue regulations which are tantamount to legislation. *Koshland* v. *Helvering*, 298 U. S. 441, 447; *Miller* v. *United States*, 294 U. S. 435, 439-440; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610; *Lynch* v. *Tilden Co.*, 265 U. S. 315, 320-322; *Morrill* v. *Jones*, 106 U. S. 466, 467; *United States* v. *200 Barrels of Whiskey*, 95 U. S. 571, 576.

Here, as in *Koshland* v. *Helvering, supra,* "* * * where * * * the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation."

In the case of *Miller* v. *United States, supra,* the Court held a regulation invalid "because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the act, it is not, in the sense of the statute, a regulation at all but *legislation.*" (Italics added.)

The subject statute provides for value to be determined from foreign value, export value or United States value. If they do not exist, then "cost of production" is to be used. "Cost of production" is a specific statutory formula, consisting of the addition of four elements: raw materials and labor, usual and general expense, packaging and an addition for profit equal to the profit which ordinarily is added.

Unusual expenses, such as temporary export taxes, unusual fees, etc., do not go into this formula; yet, they come out of profit.

The formula being specific, there is no authority for the administration to substitute another formula, or having determined that there is no United States value, to use that formula to determine cost of production, in lieu of the formula contained in the law. T. D. 48860 does this very thing.

T. D. 48860 starts with the selling price, which includes duty, the very thing which is sought to be established under Sec. 402(f). Then, after deducting non-dutiable charges, including duty, and the first three elements of the statutory formula, the balance

is held to be profit. This approach is legislation in every sense, beyond the powers of the Treasury Department and is invalid. *Lynch* v. *Tilden Co., supra; Miller* v. *United States, supra,* as the trial court held in the subject case.

2. The addition for profit * * * equal to the profit which ordinarily is added is the profit which was added by the manufacturer of "El Masco".

"An addition for profit * * * equal to the profit which ordinarily is added * * * by manufacturers * * *" means—and can mean only—the gross profit which is ordinarily added *after* raw material, direct labor, usual and general expense and packaging have been determined.

Certainly, Congress can be deemed to have known the normal way the majority of business men compute selling price, as their method is well known (App. IV and V), particularly when Congress adopted the very formula which the majority of businessmen use.

"The majority of companies do their pricing by a formula which takes into account on a percentage basis raw material, labor, overhead, sales expense, trade discounts and profit" (Pricing Policies, Dartnell Management Methods Research—Report 572).

In Appendices IV and V the Court will find the price formula in current use by various types of manufacturers. A mere scrutiny discloses it to be the formula of the statute and the very formula used by Walter Mack, in determining the selling price of "El Masco".

Mack had made a three-year arrangement for the

purchase of sugar in Mexico, subject to the approval of the United States (Tr. 25). He computed his costs (Tr. 26-28) and "included in the selling price approximately $44.00 as profit" (Tr. 29).

The United States Court of Customs and Patent Appeals was concerned with the value of this computation of selling price, because made several months before the manufacture of "El Masco", due to the fact that the Court missed a salient point not missed by the trial judge, who heard the witness.

"El Masco" is the name given to the product of sugar and other ingredients, produced in Mexico and imported into the United States, for use in the manufacturing and bottling in the United States of the beverage known as "Pepsi Cola" (Tr. 25-27).

Sugar costs represent 75 per cent of total costs of "El Masco", other ingredients 11 per cent, direct labor 1¼ per cent, usual and general expense 8¼ per cent and packaging 4½ per cent (Tr. 100).

The sugar had been contracted for. Other ingredients, the Pepsi-Cola Company had been supplying for years. Usual expenses and packaging costs are known by experience. Only duty and variable labor costs were unknown. Excluding duty which could not be known and is not yet known, there remained as a pure estimate only direct labor costs, which could be only a fraction of 1 per cent.

The record shows that the manufacturer of "El Masco" thus computed selling price, upon the basis of *known facts* which did not change months later, in accordance with the statute, both of which accord in every way with usual business methods.

3. The United States Court of Customs and Patent Appeals erred in reversing the appellate court in its application of Section 402(f) of the Tariff Act.

The Court erred in following the substance of T. D. 48860, since that Treasury Decision is invalid (Cases, *supra* 11).

The Court erred in failing to give to the statutory language the ordinary meaning of the words thereof. *United States* v. *Isham,* 17 Wall. 496; *United States* v. *Merriam,* 263 U. S. 179; *Hartranft* v. *Wiegmann,* 121 U. S. 609, 616.

The Court erred in failing to give to the words "an addition for profit * * * equal to the profit which ordinarily is added * * * by manufacturers * * *" the meaning which they have to the average business man, with respect to whom Congress legislated. (*Supra* 13).

The Court erred in substituting its evaluation of the testimony of Walter Mack, for that of the trial court. In so doing, the Court exceeded its appellate power.

The function of the trial court was to weigh the evidence and apply the clear words of the statute thereto. The function of the appellate court was to decide whether there was substantial evidence to support the finding made by the trial court and whether the correct rule of law had been applied.

While the Court below said that the findings of the trial and appellate courts lacked substantial evidence, actually, the Court below weighed the evidence and substituted its opinion respecting its weight for that of the trial court. Its error in ultimate conclusion was due to the fact that the Court had no knowledge

of, or ignored, business practices, failed to give proper weight to the manufacturing cost data (Tr. 99-100), when considered in conjunction with Walter Mack's testimony (Tr. 25-29), and failed to apply the clear language of the statute to the uncontradicted evidence. Had the Court applied the statute, instead of T. D. 48860, and noted the data available to Mack, when he computed the selling price of "El Masco", it could not have rejected his testimony. In doing so, the Court went beyond its powers of review, despite all that that Court has said to the contrary respecting the scope of its power of review. Cf. *United States* v. *F. S. Allenby & Co.*, 20 Cust. & Pat. App. 80; *United States* v. *R. R. Rogers Chemical Co.*, 18 Cust. & Pat. App. 45; *United States* v. *Wheeler, Elder & Elder*, 17 Cust. & Pat. App. 279; *May Co.* v. *United States*, 17 Cust. & Pat. App. 190.

The errors of the Court below will affect many thousands of importers unless its decision is reversed in this case.

CONCLUSION.

It is respectfully submitted that the decision below should be reversed.

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DAVID A. GOLDEN,
Of Counsel.

APPENDIX I.

SEC. 501. NOTICE OF APPRAISEMENT—REAPPRAISEMENT.

(a) The collector shall give written notice of appraisement to the consignee, his agent, or his attorney, if (1) the appraised value is higher than the entered value, or (2) a change in the classification of the merchandise results from the appraiser's determination of value. The decision of the appraiser shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed with or mailed to the United States Customs Court by the collector within sixty days after the date of the appraiser's report, or filed by the consignee or his agent with the collector within thirty days after the date of personal delivery, or if mailed the date of mailing of written notice of appraisement to the consignee, his agent, or his attorney. No such appeal filed by the consignee or his agent shall be deemed valid, unless he has complied with all the provisions of this Act relating to the entry and appraisement of such merchandise. Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the United States Customs Court and shall be assigned to one of the judges, who shall in every case, notwithstanding that the original appraisement may for any reason be held invalid or void and that the merchandise or samples thereof be not available for examination, after affording the parties an opportunity to be heard on the merits, determine the value of the merchandise from the evidence in the entry record and that adduced at the hearing. Reasonable notice shall be given to the importer and to the person designated to represent the Government in such proceedings of the time

and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. In finding such value affidavits and depositions of persons whose attendance can not reasonably be had, price lists and catalogues, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government may be admitted in evidence. Copies of official documents, when certified by an official duly authorized by the Secretary of the Treasury, may be admitted in evidence with the same force and effect as original documents. The value found by the appraiser shall be presumed to be the value of the merchandise and the burden shall rest upon the party who challenges its correctness to prove otherwise.

(b) The judge shall, after argument on the part of any of the interested parties requesting to be heard, render his decision in writing together with a statement of the reasons therefor and of the facts on which the decision is based. Such decision shall be final and conclusive upon all parties unless within thirty days from the date of the filing of the decision with the collector an application for its review shall be filed with or mailed to the United States Customs Court by the collector or other person authorized by the Secretary of the Treasury, and a copy of such application mailed to the consignee, or his agent or attorney, or filed by the consignee, or his agent or attorney, with the collector, by whom the same shall be forthwith forwarded to the United States Customs

Court. Every such application shall be assigned by the court to a division of three judges, who shall consider the case upon the samples of the merchandise, if there be any, and the record made before the single judge, and, after hearing argument on the part of any of the interested parties requesting to be heard, shall affirm, reverse, or modify the decision of the single judge or remand the case to the single judge for further proceedings, and shall state its action in a written decision, to be forwarded to the collector, setting forth the facts upon which the finding is based and the reasons therefor. The decision of the United States Customs Court shall be final and conclusive upon all parties unless an appeal shall be taken by either party to the Court of Customs and Patent Appeals upon a question or questions of law only within the time and in the manner provided by section 198 of the Judicial Code, as amended.

(c) If upon the hearing of a protest, the United States Customs Court shall declare an appraisement of merchandise made after the effective date of the Customs Administrative Act of 1938 to have been invalid or void, it shall remand the matter to a single judge, who shall proceed to determine the proper dutiable value of such merchandise in the manner provided for by this section. In such proceeding no presumption of correctness shall attach to the invoice or entered values.

APPENDIX II.

SEC. 402, VALUE.

(a) Basis.—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

* * * *

(f) Cost of Production.—For the purpose of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

APPENDIX III.

T. D. 48860.

Antidumping Act of 1921—Cost of Production

Interpretation of the terms "usual general expenses" "profit" in section 206, Antidumping Act of 1921.

Treasury Department,
Office of the Commissioner of Customs,
Washington, D. C.

To Customs Appraising Officers and Others Concerned:

The Bureau has been asked to rule that the terms "usual general expenses" and "profit which is ordi-

narily added", as they appear in section 206 of the Antidumping Act of 1921 (U. S. C. title 19, sec. 165), contemplate only expenses and profit which may be attributed to the creation of merchandise, and not those attributable to its distribution and sale. The statute in question reads:

> Sec. 206. Cost of Production.—That for the purposes of this title the cost of production of imported merchandise shall be the sum of—
>
> (1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing, identical or substantially identical merchandise, at a time preceding the date of shipment of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;
>
> (2) The usual general expenses (not less than 10 per centum of such cost) in the case of identical or substantially identical merchandise;
>
> (3) The cost of all containers and coverings, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and
>
> (4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) equal to the profit which is ordinarily added, in the case of merchandise of the same general character as the particular mer-

chandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same general trade as the manufacturer or producer of the particular merchandise under consideration.

After a careful consideration of the terms of the statute, its legislative history, and pertinent judicial decisions, the Bureau has reached the following conclusions:

(1) The "cost of production" contemplated by the statute is a constructive "foreign-market value" as the latter term is defined in section 205 of the Antidumping Act of 1921 (U. S. C. title 19, sec. 164).

(2) The "usual general expenses" contemplated by paragraph (2) of section 206 are all of the *usual* expenses incurred by the manufacturer or producer of the particular merchandise under consideration in connection with the creation, storage, sale, and distribution of merchandise which is identical or substantially identical with the particular merchandise under consideration except those usual expenses which are covered by paragraphs (1) and (3) of such section.

(3) Under paragraph (4) of section 206 the "profit which is ordinarily added in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same general trade as the manufacturer or producer of the particular merchan-

dise under consideration", is the usual difference between the manufacturers' or producers' selling prices of such merchandise of the same general character and all costs and expenses incurred by such manufacturers or producers in connection with such merchandise.

Whether reported expenses are "usual" or extraordinary is in each case a question of fact to be determined by appraising officers in accordance with the same principles which govern their determination of "usual wholesale quantities" and "ordinary course of trade" for the purposes of section 402 of the Tariff Act of 1930. Since the purpose of section 206 is to determine a "foreign-market value" as defined in section 205 of the antidumping act, the usual expenses incurred with respect to identical or substantially identical merchandise sold for home consumption should be used if the facts support a determination of such expenses. If identical or substantially identical merchandise is not sold for home consumption in the country of production the usual expenses incurred with respect to identical or substantially identical merchandise exported to third countries should be used and if this in turn is not available the expenses incurred with respect to the merchandise imported into the United States must be adopted.

The addition for profit contemplated by paragraph (4) of section 206 is also a question of fact in determining which appraising officers are authorized by section 209 of the antidumping act (U. S. C. title 19, sec. 168) to ascertain or estimate the amount by all reasonable ways and means. If merchandise of the same general character as the particular merchandise under consideration and otherwise within the terms of paragraph (4) is sold for home consumption

in the country of production the usual profit realized from such sales is the profit to be added. In the absence of such sales, profits from sales to third countries or to the United States must be considered in turn.

If the ascertained sum of all the usual general expenses under paragraph (2) of section 206 is less than 10 percent of the total ascertained sum under paragraph (1) of such section, such 10 percent will be taken as the total sum of the "usual general expenses". The sum to be added under paragraph (4) shall in no case be less than 8 percent of the sum of the amounts found under paragraphs (1) and (2). The 10-percent clause in paragraph (2) and the 8-percent clause in paragraph (4) are in no case to be invoked otherwise than to establish the minimum sum of the "usual general expenses" or the minimum addition for profit as the case may be.

EXHIBIT NO. 1 PRICING FORMULAS IN CURRENT USE

Type of Manufacturer	Raw Material	Labor	Overhead	Sales Expense	Discounts	Profit
Business forms	60		10	25	none	5
Clothing, hospital	47	16	19	14	none	4
Electric appliances	29	7	8	3	40	13
Farm equipment	59.2	16.4	19.9	2.5	none	2
Food	45	15	10	20	(Traffic 7)	3
Health products (direct)	17.5		11.7	55	none	15.8
Household furnishings	48	18.5	15	8.5	none	10
Jewelry	25	25	10	30	none	10
Machinery	20	40	15	15	none	10
Mill Work	45	25	5	5	5	10 (Delivery 5)
Paint	64.4	17.6		11.5	2	4.5
Paint, industrial	55	15	15	10	1	4
Paper products	53	12	16	11	none	9
Safety equipment	40	22	14	12	none	12
Steam boilers	25	10	15	19	22	9
Trucks	39	6	20	7	25	3

APPENDIX V.

Cost Accounting Theory and Practice (1924) J. L. Dohr, M.S., LL.B., C.P.A.

P. 39. *"The Elements of Sale Price.* The selling price of the article is then made up of the following items:

Direct Materials } Prime
Direct Labor } Cost } Factory
Burden } Cost } Cost to Make
Selling Expense } and Sell }
Profit } Selling Price"

Pp. 232-233. *"Quoting Sales Prices.* When the sales department is called upon *to establish* or quote *prices* on the finished product, *one of the most important factors* to be considered is *factory cost.* It must always be remembered that this factor alone cannot be used in fixing the sales price because other factors influence the problem. In a competitive business the prices fixed by competitors must be regarded, but the cost of manufacture is always an important element.

* * * *

"In addition, however, it is necessary *in establishing prices,* to consider several other factors. *To the factory cost must be added the appropriate container cost* dependent upon the kind of container the customer desires. Figures on container costs must, therefore, be made available to the sales department. If the price is to include *out-freight* (which is not paid by the customer as a separate item) the traffic department will be called upon to establish the proper freight rate to the customer's factory. *An addition*

must also be made to cover the selling and administrative cost, and some analysis of these items must be made to determine the amounts to be added to the factory cost for covering such expense. ***Finally, the desired amount of profit must be added*** to enable the company to pay dividends on its stock and interest on its borrowed capital (when not considered a part of cost), provide funds for extensions and improvements, and provide a reserve for losses in periods of depression." (Italics supplied.)

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 220

JOVITA PEREZ, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Customs Court (R. 143) is reported in 17 U. S. Cust. Ct. 331. The opinion of the appellate division of the Customs Court (R. 165) is reported in 19 U. S. Cust. Ct. 292. The opinion of the Court of Customs and Patent Appeals (R. 178) is reported in 84 Treasury Decisions (Advance Pamphlet 19) at page 13.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on March 1, 1949 (R. 188).

Petition for rehearing was denied on May 2, 1949 (R. 211). The petition for a writ of certiorari was filed on July 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1256.

QUESTION PRESENTED

Whether the court below erred in holding that there was no substantial evidence in the record to sustain the judgment of the appellate division of the Customs Court.

STATUTE INVOLVED

The pertinent provisions of the Tariff Act of 1930, as amended (46 Stat. 590; 52 Stat. 1077; 19 U. S. C. 1402) are set forth in the Appendix.

STATEMENT

In August, 1942, the Pepsi-Cola Company, a domestic corporation, organized the Mexican-American Flavors Co., S. A., of Monterrey, Mexico, for the purpose of manufacturing, in Mexico, a flavoring syrup to be used in the United States in the manufacture of the beverage known as "Pepsi-Cola". The syrup thus manufactured was known as "El Masco," and the entire production of the Mexican company for a period of about 13 months [1] was sent by that company to the United States for ultimate use by franchised bottlers of "Pepsi-Cola." (R. 23-26, 182.)

On November 24, 1942, there was imported into the United States at the port of Laredo, Texas, six

[1] At the end of that period the company went into liquidation.

50-gallon barrels of the El Masco syrup which had been manufactured by Mexican-American Flavors Co. The flavoring syrup was entered by petitioner for ad valorem duty purposes at a net value of $167.06 per unit of six barrels. The customs appraiser appraised the merchandise on the statutory basis of the "cost of production" as defined in Section 402(f) of the Tariff Act, *infra*, pp. 13-14, and advanced the value thereof to $215.16 per unit of six barrels. (R. 179.) Petitioner filed an appeal for reappraisement by the Customs Court under Section 501 of the Tariff Act of 1930 (46 Stat. 590, 730; 19 U. S. C. 1501) (R. 4-5), and that court (a single judge sitting as a trial court) found the statutory cost of production of El Masco to be $135.25 per unit of six barrels (R. 143-160).[2]

Thereafter both the United States and petitioner appealed to the appellate division of the Customs Court (R. 161-164), and that division modified the judgment of the single judge by finding and holding that the statutory cost of production of the merchandise was $147.85 per unit of six barrels[3]

---

[2] Both parties agreed that the statutory cost of production was the proper basis for appraising El Masco syrup (R. 182). Section 402(a) of the Tariff Act, *infra*, p. 13, provides that for the purposes of that Act the value of imported merchandise shall be the foreign or export value, whichever is the higher; if there be no foreign or export value then the United States value; and if there be no foreign, export, or United States value, then the cost of production.

[3] Section 503 of the Tariff Act of 1930 (46 Stat. 590; 19 U.S.C. 1503) provides that the basis for assessing ad valorem duties on imported merchandise shall be the entered value or the final appraised value, whichever is higher. Since the value found by the appellate division, $147.85, was lower

(R. 165-176). On appeal by the United States, the Court of Customs and Patent Appeals reversed the decision of the appellate division of the Customs Court, holding that there was no substantial evidence in the record to sustain either the judgment of the trial judge or the judgment of the appellate division of the Customs Court (R. 178-185), and remanded the case for further proceedings (R. 188).

ARGUMENT

The only issue in the case at bar is the question whether there was any substantial evidence in the record to sustain the finding of the appellate division of the Customs Court that the statutory cost of production of El Masco syrup was $147.85 per unit of six barrels of 50 gallons each.[4] That question turns, of course, on the peculiar facts in the case at bar. Moreover, it is unlikely that the unique circumstances which gave rise to the issues presented will recur. It is plain at the outset, therefore, that the case presents no question which warrants review by this Court.

1. Section 402(a) of the Tariff Act, *infra,* p. 13, provides that in the event there be no "foreign," "export," or "United States," value for imported merchandise, the basis for appraising such merchandise shall be the "cost of produc-

---

than the entered value of $167.06, the latter would, in the absence of reversal, have become the basis for assessing the duties in the instant case.

[4] The review of Customs Court decisions in reappraisement cases is upon questions of law only. See 19 U. S. C. (1946 ed.) 1501, now 28 U. S. C. 2637.

tion."[5] Section 402(f) provides that the cost of production shall be the sum of:

> (1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;
>
> (2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;
>
> (3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and
>
> (4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

---

[5] Foreign, export, and United States values are defined in subsections (c), (d), and (e), respectively, of Section 402 of the Tariff Act of 1930 (46 Stat. 590, 709; 19 U. S. C. 1402).

Both parties herein have agreed that cost of production was the proper basis for appraising El Masco syrup (R. 167, 182). Furthermore, there was no dispute between the parties with respect to the amounts of the items of cost set forth in the first three paragraphs of Section 402(f), *supra* (R. 168). Consequently, the only controverted question left for decision by the appellate division of the Customs Court was limited to a determination of the amount of the "profit" required by the fourth paragraph of Section 402(f), *supra,* to be added to the aggregate of the other items of cost provided for in the first three paragraphs of that section in order to complete the statutory cost-of-production formula. Thus, while the broad issue before the Court of Customs and Patent Appeals was whether there was any substantial evidence in the record to sustain the appellate division's finding with respect to the cost of production, the controversy before that court was limited to the question whether the appellate division's finding with respect to the item of profit to be added to the aggregate of the other cost factors was supported by any substantial evidence.

The evidence relied upon by the trial court to support its finding that the cost of production of El Masco syrup was $135.25 per unit of six barrels, which included a profit of 35 per cent, consisted of matters purporting to show the amounts ordinarily added as profit to their production costs by three Mexican syrup manufacturers other than Mexican-

American Flavors Co. This evidence was found by the appellate division of the Customs Court to be inadequate for the purpose, since these companies had not kept books of account or other substantial records to show the amounts they had added as profits to their production costs. The appellate division also pointed out other reasons why the evidence relating to these companies was inadequate, *e. g.*, (1) the American importers of their syrup furnished part of the labor and materials entering into the manufacture of the products of some of the companies, and (2) the evidence purporting to show the amounts of the profits added by some of those companies was hearsay in character (R. 171-173). The Court of Customs and Patent Appeals reached the conclusion that there was substantial evidence in the record to sustain this finding by the appellate division,[6] and its holding is clearly justified by the evidence pointed out above, which the appellate division emphasized to support its finding.

The evidence relied upon by the appellate division of the Customs Court to support its finding that the cost of production of the imported syrup was $147.85 per unit of six barrels, which included a profit equalling 44.59 per cent of the other costs, consisted of cost-of-production sheets introduced by both parties (R. 168) and the testimony of

[6] Since this finding was adverse to petitioner, and since he took no appeal therefrom to the Court of Customs and Patent Appeals, it is not clear that petitioner was in a position in the court below to attack the finding.

Walter S. Mack, Jr., who was President of both Pepsi-Cola Company and Mexican-American Flavors Co. (R. 175-176). Mr. Mack testified that at the time of the organization of Mexican-American Flavors Co., and before it began to manufacture El Masco syrup, the sales price of that syrup was fixed at $296.00 per unit of six barrels, and that it was estimated at that time that the profit which the company would add would be $44.00 per unit of six barrels, or approximately 33 per cent. of production costs (R. 29-36). On redirect examination he testified that the only reason for fixing the sales price at $296.00 per 300 gallons, or six-barrel unit, was because it was estimated that that amount would be the maximum price which the small Pepsi-Cola bottlers would be able to pay and maintain a retail price of five cents per bottle (R. 37). Mr. Mack's testimony did not purport to show the profit actually added by his Mexican company to its production costs.

The appellate division of the Customs Court found that Mr. Mack's testimony was sufficient to show the profit ordinarily added by Mexican-American Flavors Co. to its production costs. On the Government's appeal, however, the Court of Customs and Patent Appeals reversed on the ground that Mr. Mack had given no testimony at all to show the profit usually added by his company, since he had admitted that the amount he claimed was added by the company for profit was merely an estimate which had been made prior to the time

the company had begun to manufacture the syrup, and since he had also testified that the sales price of the syrup had been fixed without regard to cost of production or profit (R. 187). The court below concluded that "The item of profit [provided for in Section 402(f)] cannot be based upon the 'estimated profit' but must be based on the profit usually added." In reaching this conclusion the court below pointed out that Mexican-American Flavors Co. had, after it began to manufacture El Masco syrup, kept thorough accounting records. It then noted that the only substantial evidence in the record as to the amount of profit added by that company to its production costs, was that embodied in the Customs Agent's report, prepared from the company's records and from interviews with its officers, which report plainly showed that the actual profit added by that company to its production costs was $99.25 per unit of six barrels, or 98.15 per cent. of its production costs[7] (R. 185-186).

---

[7] In this connection, the court below expressed the view that since Mexican-American Flavors Co. was the only Mexican syrup manufacturer which had kept records from which the cost of production could be ascertained, it was, for the purpose of this case, the sole manufacturer in Mexico of merchandise of the same class or kind as the merchandise here involved. Thus, the court below applied to Section 402(f), *infra*, pp. 13-14, the construction which it had previously placed upon Section 402(e) of the Tariff Act of 1922 (42 Stat. 949) in the case of *United States* v. *Henry Maier*, 21 C. C. P. A. 41, to the effect that the profit ordinarily added by the manufacturer of imported merchandise may be resorted to where merchandise of the same general character is not produced by other manufacturers in the country of origin. The language of Section 402(f) of the 1930 Act is identical with that found in Section 402(e) of the 1922 Act.

The rejection by the court below of the testimony of Walter S. Mack, Jr., that Mexican-American Flavors Co. had added to its production costs $44.00 per unit of six barrels, or 33 per cent., as profit, was obviously justified. This witness admitted on cross-examination that the amount he claimed was added as profit was merely an estimate which had been made before the company had begun to manufacture syrup. It would be obviously wrong in any circumstances to accept a pre-manufacture estimate of the profit to be added to production costs as evidence of the profit "ordinarily added" to such costs after manufacture, but it would be absurd to accept such an estimate as the best evidence of the profit actually added, in the face of detailed records made during the course of manufacture showing a realized profit nearly three times greater than the amount estimated. The statutory cost of production found by the appellate division could not be legally determined in the absence of evidence showing the profit ordinarily added by the company, and since there was no substantial evidence before that division to show what amount was ordinarily added by the company as profit, we submit that the court below committed no error in holding that there was no substantial evidence in the record to sustain the judgment of the appellate division of the Customs Court.

Petitioner's contention (Pet. 15-16) that the court below exceeded its appellate power by weighing the testimony of Walter S. Mack, Jr., is with-

out merit. The court below did not weigh that testimony. It held that Mack's testimony was incompetent for the purpose of showing the amount of profit added by his company, because the amount which he stated had been added was merely a pre-manufacturing estimate which could not be legally used to show the amount of profit usually added by a manufacturer.

2. Petitioner contends that Treasury Decision 48860, *infra*, pp. 14-15, which he states was followed by the appraiser in this case, is contrary to Section 402(f), *infra*, pp. 13-14, and is therefore invalid (Pet. 2-3, 11-12), but he does not make clear wherein its alleged invalidity lies. He states that the method suggested therein for ascertaining the profit to be added to production costs is not the formula used by manufacturers in general, and by Walter S. Mack, Jr., in particular in determining the selling price of El Masco syrup. He does not show, however, why the so-called percentage method suggested by him is any more accurate than the method followed by the appraiser; nor does he refute the pronouncement of the court below that the item of profit contemplated by Section 402(f) may not be based on "estimated profit" but only on the profit usually added. We find no substance in petitioner's contention.

CONCLUSION

The decision below is correct. There is no conflict of decision, and the case does not warrant

further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Solicitor General.

DAVID N. EDELSTEIN,
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JOHN R. BENNEY,
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AUGUST 1949.

APPENDIX

Tariff Act of 1930 (46 Stat. 590, 708; 19 U. S. C. 1402):

SEC. 402. VALUE.

(a) Basis.—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

(4) In the case of an article with respect to which there is in effect under section 336 a rate of duty based upon the American selling price of a domestic article, then the American selling price of such article.

* * * * *

(f) Cost of Production.—For the purposes of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the par-

ticular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and;

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

Treasury Decision 488860 (71 Treas. Dec. 431):

(3) * * * the "profit which is ordinarily added in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same gen-

eral trade as the manufacturer or producer of the particular merchandise under consideration," is the usual difference between the manufacturers' or producers' selling prices of such merchandise of the same general character and all costs and expenses incurred by such manufacturers or producers in connection with such merchandise.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 220.

JOVITA PEREZ,
Petitioner,

v.

THE UNITED STATES,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Counsel for Petitioner.

PREW SAVOY,
DAVID A. GOLDEN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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THE UNITED STATES,
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REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Argument.

Petitioner, in its Petition for a Writ of Certiorari, has presented to this Court questions of national importance which should be determined by this Court.

They are the questions which were presented to the Trial Court and to the First Division (Appellate Term) of the United States Customs Court, by reason of the conclusions contained in Government Exhibit 6, based on T. D. 48860, which had resulted in the appraisement of which Petitioner complains.

These questions are:

(1) What is the addition for profit * * * equal to the profit which ordinarily is added * * * by

manufacturers * * * in determining cost of production under Section 402(f) of the Tariff Act of 1930?

(2) Did the Secretary of the Treasury exceed his powers in promulgating T. D. 48860?

(3) Did the United States Court of Customs and Patent Appeals correctly apply Section 402(f) of the Tariff Act of 1930, in determining cost of production of "El Masco"?

The Government, in its Brief in Opposition, ingeniously seeks to persuade this Court that the sole issue presented in this case is whether there was sufficient evidence to support the findings of the Trial Court, and that the issue results from facts peculiar to this case (Br. in Op., p. 4), none of which is true.

If this Court is misled by this position, as was the Court of Customs and Patent Appeals, where this was the sole question briefed and argued by the Government, but not the importer, then the Treasury Department will continue to apply T. D. 48860, unquestioned, to the damage of this Petitioner and of thousands of other importers. That is the result which the Government, in fact, seeks to accomplish by its Brief in Opposition.

Counsel for Petitioner would not have the temerity, nor do they have the lack of experience, to ask this Court to review a question of the type which Respondent says is involved.

One does not get to the question which Respondent has presented, until T. D. 48860 has been applied, as there is no occasion to examine ultimate profits, except under T. D. 48860, the very reason why Petitioner contends that that Treasury Decision is not in accordance with the statute.

Section 402(f) of the statute is clear. Four elements are required to be *added.*

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, *at a time preceding the date of exportation of the particular merchandise* under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business. (Italics supplied.)

(2) The addition for usual general expenses of such or similar merchandise, referred to in (1).

(3) Cost of all containers incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States.

(4) An addition for profit of a sum equal to the profit which ordinarily *is* added, in the case of merchandise of the same general character as the particular merchandise under consideration.

This language has been the statutory language since 1922. Prior thereto, the definition of value for the appraisement of imported merchandise was the actual market value or wholesale price thereof, *at the time of exportation to the United States,* in the principal markets of the country from whence exported.

Thus, it is clear that you add four specifically defined items determined in amount *at a time prior to, or at the very time of exportation.*

There is no provision of law, nor has there been a court decision that determines value based upon figures

or facts that happened *subsequent* to the exportation of the merchandise from the foreign country and its importation into the United States, as required by T. D. 48860.

That the "time of exportation" has been the focal point for ascertaining value of imported merchandise for over fifty years, is evidenced by the following quotation from the opinion of Chief Justice Fuller of this Court, in *United States* v. *Passavant,* 169 U. S. 16, 22:

> "What was to be ascertained was the actual market value or wholesale price of the merchandise as bought and sold in usual wholesale quantities at the time of exportation, in the principal markets of the country from whence imported. This market value or price was the price in Germany and not the price after leaving that country, and the act does not contemplate two prices or two market values."

From the above, we respectfully submit that the Court below erred in considering factors which happened subsequent to the date of exportation.

T. D. 48860 and the decision of the Court of Customs and Patent Appeals do not add the four elements required to be added by Section 402(f) of the statute, and they take into account factors which happened subsequent to the date of exportation.

T. D. 48860 instructs appraisers to take the selling price in the United States (United States value—a basis which it has been agreed is inapplicable), to deduct therefrom certain costs and the estimated duty, which is the very thing to be determined herein, and to conclude that the balance, if any, is the "profit

added". This so-called profit is then added back, and the basis for appraisement is determined. This whole procedure is violative of the expressed provisions of the statute and its use should be prohibited by this Court, when cost of production is the basis of an appraisement.

After giving effect to T. D. 48860 (R. 185-186) and failing to give effect to manufacturers' practices in computing selling prices, which is to make an addition for profit—at that time—the Court of Customs and Patent Appeals then considered the evidence in the light of its error. The Court only then concluded that, "It naturally follows that the profit usually added is the profit actually added".

The Court did not weigh the evidence in connection with the question as to what the addition for profit was at the time of exportation—but as determined by subsequent events, and found the books of some exporters inadequate to determine ultimate profits—not the profit added when selling prices were determined—and the testimony of Walter S. Mack insufficient because made prior to manufacture.

Petitioner is not asking this Court to weigh the evidence, but again wishes to point out that when Walter Mack fixed the selling price of "El Masco" at $296.00 per unit, all costs except labor were known, and the profit added was $44.00 (R. 25-29, 100). This is the profit "usually added * * * by manufacturers" because this exporter was by far the largest manufacturer of this product.

True, the "realized profit" of all exporters was more or less than the profit added at the time of the "addition for profit", as it was bound to be, but what has that to do with the statute?

The Court of Customs and Patent Appeals, confused

by T. D. 48860, proceeded to weigh this evidence in connection with realized profit, and found it inadequate. It could do so only after applying T. D. 48860 —not upon its application of the express language of the statute.

Also, so-called "realized profit" or "profit actually added" cannot be *actual* profit, as this Court will readily see, but it is the profit computed under T. D. 48860.

Extraordinary expenses actually paid out of pocket are eliminated, when Section 402(f) is properly applied (R. 38-40). Yet, they are contained in the profit computed by Respondent and the Court below under T. D. 48860. The difference between the 55.18076% and 11.63972%, for overhead, is shown by Government Exhibit 6 (R. 76) to be taxes paid to the Mexican Government by the manufacturer of "El Masco". While not usual general expenses, as enumerated in Section 402(f), they were actually a production cost, and in no sense a profit. Yet they are contained in the so-called "realized profit", or profit "actually added".

Furthermore, actual profit cannot be determined until after the close of this suit, because the importer's obligation for duty cannot be ascertained until the final decision of this case.

Finally, there can, in any event, be no actual profit in the first unit of six barrels of "El Masco" which were imported after the manufacturer went into business. The manufacturer went into business in November, 1942 (R. 91). This first unit was imported November 24, 1942. It is notorious that a company must be in production for some time before any profit can be realized.

From the foregoing, it would seem axiomatic that Congress could not, by the words, "an addition for profit which ordinarily is added by manufacturers", have intended that "realized profit" was to be taken. T. D. 48860 prescribes a formula for figuring an arbitrary "realized profit". This Treasury Decision formed the basis for the decision below. Congress must have meant the profit which is actually added by manufacturers when they establish the selling price.

The profit which "ordinarily is added * * * by manufacturers" is the profit which was actually added by the manufacturer of "El Masco", when the selling price of "El Masco" was determined. True, the selling price was limited by a ceiling which would permit the manufacture and sale of Pepsi-Cola at five cents a bottle, just as the selling price of any article may be limited by competition. But, that does not affect the fact that the profit actually added was $44.00 per unit, and that this was the profit which is ordinarily added.

Respondent glosses over the practice of manufacturers making an addition for profit at the time they fix selling prices, with the extraordinary statement that Petitioner has failed to show that such method is superior to that employed in T. D. 48860, and further suggests that Petitioner has failed to show wherein T. D. 48860 violates the statute (Br. in Op., p. 11).

T. D. 48860 violates the statute (1) by not adding an addtion for profit, when the selling price is determined, at the time of, or prior to, exportation, and by substituting therefor a completely erroneous so-called "realized profit", and (2) by taking events after exportation to determine the profit "actually added".

It would seem hardly necessary to point out a second time that the so-called "estimated profit", in determining the selling price of "El Masco", is the method employed by manufacturers generally when they establish selling prices (Pet. Br. 13, Apps. IV & V) and that Congress must be presumed to have known business practices, when it adopted the particular language of the statute, and to have given it recognition. The method adopted by the Trial Court is the statutory method, while the method adopted by the Court below and the Government, under T. D. 48860, is an arbitrary method.

The question involved, as represented by Petitioner, is of great importance to importers. It does not depend upon "unique circumstances". Thousands of importers are, and will be, affected.

In the Port of New York alone, from July 1, 1948, to June 30, 1949, there were 213,261 entries.

About one per cent are based upon either American selling price or United States value (Customs Valuation in the United States, R. Elberton Smith, 1948, p. 196).

It is estimated that slightly more than four per cent are based upon "cost of production", the remainder being based upon foreign and export value.

Thus, in the Port of New York alone, in one year, at least 8,000 or 9,000 entries were affected by T. D. 48860.

The question presented is not one to be ignored or lightly passed over, as does the Brief in Opposition.

CONCLUSION.

The question presented is as represented by Petitioner. The question is of national importance. The Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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